(2)

No. 88-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

N & C PROPERTIES; NEDA, INC. OF DESTIN;
AND CHANCELLOR LAND CO., INC.,
Petitioners,

vs.

CHARLES D. PRITCHARD, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of The United States

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

JOHN R. BENN
425 North Court Street
Florence, Alabama 35630
(205) 764-4011

Attorney for Respondents

St. Louis Law Printing Co., Inc., 13305 Manchester Road 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Interstate Land Sales Full Disclosure Act (ILSA) applies to condominium sales.

2. Whether the Alabama state courts correctly denied the application of the 100 lot exemption (15 U.S.C. 1702(b)(1)) under the facts of this case.

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Other:

No. 88-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

N & C PROPERTIES; NEDA, INC. OF DESTIN;
AND CHANCELLOR LAND CO., INC.,
Petitioners,

vs.

CHARLES D. PRITCHARD, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of The United States

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STATUTES AND REGULATIONS INVOLVED

In addition to the provision cited in the Petition for Writ of Certiorari and Appendix thereto, the following authority is germane to the resolution of this case:

24 C.F.R. § 1710.1 Definitions

"Lot" means any portion, piece, division, unit, or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land.

24 C.F.R. § 1710.5 Statutory Exemptions From Provisions of This Chapter

The requirements of the Act do not apply to —

(a) The sale or lease of lots in a subdivision containing fewer than 25 lots;

(b) The sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years. In the case of condominium or multiunit construction, a presale clause conditioning the sale of a unit on certain percentage of sales of other units is permissible if it is legally binding on the parties and it is for a period not to exceed 180 days. However, the 180-day provision cannot extend the two-year period for performance. The permissible 180 days is calculated from the date the first purchaser signs a sales contract in the project or, if a phased project, from the date the first purchaser signs the first sales contract in each phase.

Respondents have also set out in the Appendix to this Brief the pertinent regulatory announcements covering the issues in this appeal. They are 38 Fed. Reg. 23,866 (1973); 39 Fed. Reg. 7824 (1974); and 44 Fed. Reg. 24,010 (1979).

STATEMENT OF THE CASE

In the interest of brevity, Respondents will not submit a separate statement of the case. Respondents do wish to clarify one particular point. In raising the Second Question, Petitioners focus on the application of the "common promotional plan" aspect of Section 1701(4). The Alabama Supreme Court in reviewing the trial court decision was essentially reviewing a factual determination made by a lower court. The Alabama Supreme Court noted numerous factual aspects of the appellate record which supported the lower court decision. Among them were:

(1) That Neda, Inc., was formed to promote and sell units in both Phase I and Phase II; (2) The project was advertised, represented, and marketed as a two-phase project consisting of two individual towers adjoining each other, Phase I containing 55 units and Phase II containing 46 units; and (3) The project was advertised and intended by the owners to be a two-phase project containing over 100 units. The investors offered the sworn testimony of Authur Hill, president of Gulf South Corridor Properties, and Winston Biggs, president of Chancellor Land Company, Inc., in support of their claim during the hearing on March 20, 1986. The testimony of both men was that the development was advertised, represented, and marketed as a two-phase project containing two towers. The towers were to be adjacent to one another, sharing a common lobby and beach front. Mr. Biggs testified that the Johnsons were promised the opportunity to trade their Phase I unit for a nicer unit in Phase II when it was completed.

A prospectus covering the development was, however, prepared by the developers, and it was admitted into evidence at the March 20 hearing. It was denominated "East Pass Towers Condominium Declaration," with the cover depicting twin towers on the Destin coast. Phase I of the development was to be completed by June 1, 1992. The maximum number of units in the development was to be 101 "if, in the sole discretion of the developer, Phase II is built." The prospectus also said, "The developer has reserved the right to construct additional apartment buildings . . . as part of this condominium at any time prior to June 1, 2002 . . . . The Additional units to be constructed will be 46 in number and would be contained in an additional apartment building." Advertising brouchures admitted into evidence at the hearing also depicted twin towers jointed by a common lobby.

N & C Properties v. Pritchard, 525 So.2d 1346, 1349 (Ala. 1988).

SUMMARY OF ARGUMENT

1. This case involves the interpretation of the term "lots" as defined within the Interstate Land Sales Full Disclosure Act (ILSA). From the inception of this legislation in 1968, the legislative history clearly evidenced an intent that ILSA apply to the sales of condominium units. The legislative history was consistent with both the statutory interpretation given to this term by the agency charged with the statute's enforcement as well as Congressional acceptance of the coverage of condominiums when the statute was amended several years later implementing an exception to the regulatory scheme. The decision of the Alabama Supreme Court to apply the statute to the sale of condominium units was also consistent with a chorus of federal and state decisions confirming this result. Against this background the Petition lacks the substantial federal question necessary to justify review by this Court.

The fact that the Alabama Supreme Court reviewed a lower court application of the "common promotional plan" does not yield the conclusion that the decision was "inconsistent" with the other authorities. The Alabama Supreme Court was not erroneous in its conclusion that this was a factual issue. The Appellate Record amply documented the factual conclusion that the condominium project was part of a "common promotional plan". Unlike petitioners' portrayal, there is a complete absence of any conflict involving a substantial federal question.

This Court should deny the requested writ.

ARGUMENT

I. The Interstate Land Sales Full Disclosure Act (ILSA) applies to condominium sales.

It is now well-settled that the Interstate Land Sales Full Disclosure Act applies to the sale of condominium units. This conclusion is aptly drawn from the legislative history of the Act, the statutory construction applied by agency charged with administering its provisions, as well as Congressional acceptance of this result, and both federal and state caselaw. With the exception of a single federal district court decision, which was reversed on appeal, all courts have applied the Act to the sale of condominium units.

A. Legislative History

The Interstate Land Sales Full Disclosure Act (ILSA) was originally enacted as part of the Housing and Urban Development Act of 1968. The disclosure aspects of this legislation was designed to prevent false and deceptive practices in the interstate sale of tracts of land by requiring developers to disclose information needed by potential buyers to evaluate their purchases. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 778 (1976). The legislation was principally directed at protecting purchases from abuse by real estate developers involved in interstate commerce who used the mails in the promotions and sales of their projects. *Nargiz v. Henlopen Developers*, 380 A.2d 1361, 1362 (Del. 1977). The legislative history of the Act indicates that Congress was concerned with the sale of a multiple, undeveloped lots pursuant to a common promotional plan. Conf.Rep. No. 1785, 90th Cong., 2nd Sess. (1968), reprinted in 1968 U.S. Code Cong. and Ad. News 3053, 3066. In essence, ILSA is an antifraud statute that utilizes the requirement of disclosure as its primary tool.

The key term in the statutory scheme is "lot". The ILSA is triggered when there is a proposed sale of a non-exempt "lot".

This term is not defined in the legislation. The Secretary of Housing and Urban Development (HUD) has by regulation defined "lot" as "any portion, piece, division, unit, or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land." 24 CFR §1710.1 (1987).

Almost from the outset of passage of the ILSA there were questions raised as to whether the Act applied to condominium developments.[1] In 1972, the Office of Interstate Land Sales Registration issued an Asvisory Opinion which noted:

> We agree that the key term is "lots" in determining whether the sale of a condominium unit can be equated with the sale of a lot in the subdivision within the meaning of the Act. We do not, however, agree that the concepts and characteristics of a lot and a condominium unit are mutually exclusive and that, therefore, a "unit" in a condominium cannot be considered a "lot".

OILSR Exemption Advisory Opinion, No. 1701.1(k) at p. 5 (August 20, 1972). Shortly after issuing the Advisory Opinion, the Secretary of Housing and Urban Development responded to builders' concerns about the application of ILSA to condominiums.

> The application of the Act to condominiums has been consistent OILSR policy since the issue was first raised in 1969. The bases for this position are that condominiums carry the indicia of and in fact are real estate, whether or not the units therein have been constructed. A condominium is accordingly viewed by OILSR as equivalent to a subdivision, each unit being a lot. Adverse comment, particularly from builders, asserts that condominiums are

---

[1]The office of Interstate Land Sales Registration (OILSR) is the organization designated by the Secretary of Housing and Urban Development to administer the Act. See 15 U.S.C. §1715 (a)(1982).

> equivalent to houses and the sale of houses was not intended to be covered by the act. However, the right to condominium space is a form of ownership, not a structural description. This condominium concept is employed as an ownership form for completely horizontal developments and even for campgrounds. Congress recognized the need to exempt professional builders from the Act and provided an appropriate exemption. (15 U.S.C. 1702[(a)(2)]). For a condominium unit sale to be exempted from the Act, it must accordingly qualify for exemption; i.e., either it must be completed before it is sold, or it must be sold under a contract obligating the seller to erect the unit within two years from the date the purchaser signs the contract of sale.

38 Fed. Reg. 23,866 (1973). Less than one year later the Office of Interstate Land Sales Registration issued an announcement emphasizing the application of ILSA to sales of condominium units:

> The Office of Interstate Land Sales Registration (OILSR) offers guidelines in re-emphasizing attention to the applicability of the federal land sales registration laws to the offer and sale of condominiums and other structures. The Preamble to OILSR regulations published on September 4, 1973 (38 FR 23866 et seq.) points out that condominiums are covered by the Act in that a condominium is equivalent to a subdivision, each unit being a lot.

39. Fed. Reg. 7824. The OILSR pronouncements, applying ILSA to condominium sales, has become the accepted view. See 15A AmJur 2d, Condominiums 20; Rohan and Reskin, Condominium Law and Practice (Matthew Bender 1976) 18A.02; "Condominium Regulation: Beyond Regulation," 123 U. of Pa.L.Rev. 639, 660.

In 1978, Congress considered amendments to ILSA which are historically important in constructing the statute. At that time,

the Act only exempted sales of improved land on which there was a residential, commercial, or industrial building or where the seller was obligated to complete such a structure within two years. Congress amended this provision to explicitly exempt condominium sales under the same situations, thus inserting the word "condominium" in the only place in the Act.[2] 15 U.S.C. §1702(a)(2) as amended by P.L. 95-557, 907(a)(1). The accompanying Senate Committee Report observed:

> Section 715(b)(1) of the bill would amend Section 1403(a)(2) [now §1702(a)(2)] of the act to provide an exemption for the sale or lease of any improved land on which there is a condominium or on which a condominium is to be built within two years. Section 1403(a)(2) presently provides an exemption for land on which there is or will be built within 2 years, a residential, commercial, or industrial building. Present HUD regulations do not provide an exemption for condominiums.

Housing and Community Development Amendments of 1978, Report of the Committee on Banking, Housing and Urban Affairs, United States Senate (Report No. 95-871, at page 97.) The Conference Committee also noted:

> The Interstate Land Sales Full Disclosure Act is amended to broaden the exemptions to include sale or lease of land on which there is a condominium building on or which a condominium building is to be built within two years.

Public Law 95-557, Summary of the Act, Joint Explanatory Statement of Managers of the Committee of Conference at page 80. The formal regulations implementing this amendment succinctly state:

---

[2] The term "condominium" refers to a form of real estate ownership, rather than to any particular type of structure. *See* 38 Fed. Reg. 23,866 (1973)

> The sale or lease of any improved land on which there is a residential, commercial, condominium or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years. In the case of condominium or multi-unit construction, a presale clause conditioning the sale of a unit on a certain percentage of sales of other units is permissible if it is legally binding on the parties and it is for a period not to exceed 180 days. However, the 180-day provision cannot extend the two-year period for performance. The permissible 180 days is calculated from the date the first purchaser signs a sales contract in the project or, if a phased project, from the date the first purchaser signs the first sales contract in each phase.

24 CFR §1710.5(b) (1987).

Consistently, since the adoption of ILSA in 1969, both Congress and the administrative agency charged with enforcing the law have acknowledged that condominium sales fall within the statutory scheme of the statute.

B. Statutory Construction.

The task before the court in considering the Petition is made relatively easy in this instance. Not only does the legislative history of ILSA provide an adequate foundation for concluding that the statutory term "lots" includes interests in condominium units, simple rules of statutory construction also dictate this conclusion.

When confronted with a problem of statutory interpretation, the Court has indicated a "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman,* 380 U.S. 1, 16 (1965). This precept of statutory construction is especially applicable when the administrative interpretation "includes a contemporaneous

construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the part work efficiently and smoothly while they are yet untried and new." *Power Reactor Dev. Co. v. International Union of Electricians*, 267 U.S. 396, 408 (1961). If the statutory provision is silent or ambiguous with respect to a specific issue addressed by a valid regulation, the reviewing court must give deference to the agency's interpretation unless it conflicts with the statute's plain meaning. *K Mart Corp. v. Cartier, Inc.*, ____U.S. ____, 108 S.Ct. 1811 (1988); *EEOC v. Commercial Office Products, Co.*, ____U.S. ____, 108 S.Ct. 1666 (1988). Stated otherwise, the construction placed upon the term "lots" by OILSR does not have to be the only reasonable one, or the one that would have been made in a judicial proceeding. The Court only needs to conclude that the administrative agency has made "*a* reasonable interpretation of the relevant provisions." *Amer. Paper Inst. v. Amer. Power Serv. Corp.*, 461 U.S. 402, 423 (1983) (empahsis in original). *See also EPA v. National Crushea Stone Ass'n.*, 449 U.S. 04, 04 (1980).

The legislative history of ILSA clearly indicates that OILSR, the federal body charged with administering the Act, has consistently maintained that condominium sales fall within the statutory provisions.[1] *See* 38 Fed. Red. 23, 866 (1973); 39 Fed. Reg. 7824 (1974). Nothing contained within the Petition urges that this was not *a* reasonable interpretation. The Eleventh Circuit in *Winter v. Hollingsworth Properties, Inc.*, 777 F.2d 1444 (11th Cir. 1985) confirmed this aspect of ILSA by noting:

> It is reasonable to conclude as HUD did, that the term "lot" was used to refer generally to interests in realty. The legislative history supports this construction, employing the terms "lot," "land," and "real estate" in discussing the Act. This construction is also reasonable in terms of the purpose of the statute. A fraudulent out-of-state sale

---

[1] The existence of a consistently held agency view interpreting a statute is an important consideration. *See Immigration & Naturalization Service v. Cardoza-Fonseca*, ____ U.S. ____, 107 S.Ct. 1207 (1987).

> of land is not rendered any less fraudulent if the condominium form of ownership is utilized.

Id. at 1448. *See also Schatz v. Jockey Club Phase III, Ltd.*, 604 F.Supp. 537, 540-41 (S.D. Fla. 1985); *Nargiz v. Henlopen Developers*, 380 A.2d 1361, 1364 (Del. 1977); *Appalachain, Inc. v. Olson*, 468 So.2d 266, 268 (Fla. App. 2 Dist. 1985). The Petition is noteworthy in its silence as to the statutory construction placed on the ILSA by the OILSR.

The conclusion that the sale of condominium units falls within the parameters of ILSA is also confirmed by analyzing the impact of the 1978 amendments. The 1978 amendments sought to specifically exclude condominiums that would be constructed within two years. Congress obviously would not specifiacally exempt this class of condominium projects if the Act did not in the first instance apply to condominiums as "lots". This conclusion is bolstered by the realization that Congress is presumed to be aware of an administrative interpretation of a statute when it legislates modifications. *Lorilland, Inc. v. Pons*, 434 U.S. 575, 580 (1978). The amendment enacted by Congress apparently constituted an implied recognition of the ILSA coverage to condominium sales. The Eleventh Circuit reached this conclusion by recognizing:

> The obvious conclusion to be drawn from this history is that Congress was aware of HUD's interpretation that the Act covered condominium sales and acted to exempt such sales where the building is existing or must, by contract, be completed within two years. If the ILSA did no include the sale of condominiums within its scope, it would be senseless to provide for exclusion of such sales under prescribed conditions. We therefore conclude that Congress was aware of, and approved of, HUD's construction of the Act and hold that the ILSA is applicable to the sale of condominiums.

Winter, 777 F.2d 1444, 1449 (1985). The Petition while recognizing the historical sequence of Congressional action offers no explanation for a contrary interpretation. Following the

argument of Petitioners, the 1978 amendment would have been superfluous. The Court should avoid am interpretation that leads to this result.

C. Federal and State Caselaw

The Petitions's weakest argument involves its attempt to justify a substantial federal question under Section 1257 in view of the existing federal and state caselaw. The Petition claims that "a majority of the courts" have found ILSA to apply to condominium is a misnomer. With the exception of one federal district court case, which was reversed on appeal, *every* federal and state decision has upheld the application of ILSA to condominium sales.

The Eleventh Circuit is the only federal appellate court to discuss this issue. In *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727 (11th Cir. 1982) the panel in reviewing a dismissal order assumed, without discussion, that ILSA applied to condominium sales. Later, in *Winter v. Hollingsworth Properties, Inc.*, 777 F.2d 1444 (11th Cir. 1985) - the principal federal authority relied upon by both the trial and appellate courts in Alabama - a different panel specifically held LISA applicable to the sale of condominiums. Thus, the Eleventh Circuit reversed the *only* reported decision to hold that ILSA did not apply to condominium sales. The decisions of all federal district courts also confirm the application of ILSA to condominium dales. (1) *Schatz v. Jockey Club Phase III, Ltd.*, 604 F.Supp. 537 (S.D. Fla. 1985); *Inversions Romar, S.A. v. Jockey Club Phase III, Ltd.*, No. 82-0695 CIV-JE (S.D. Fla. September 18, 1984); *Mosher v. Southridge Associates, Inc.*, 552 F.Supp. 1226 (W.D.Pa. 1982)(applying two year exemption).

Petitioners also can find little solace in state caselaw. *Every reported decision has upheld the application of ILSA to the sale of condominium units. Berzon v. Oriole Homes Corp.*, 497 So.2d 670 (Fla.App. 4 Dist. 1986); *Star Island Associates v. Lichter*, 473 So.2nd 791 (Fla.App. 2nd Dist. 1985); *Marco Bay*

Associates v. Vandewalle, 472 So.2d 472 (Fla. App. 2 Dist. 1985); *Appalachian, Inc. v. Olson*, 468 So.2d 266 (Fla.App. 2 Dist. 1985); *Grove Towers, Inc. v. Lopez*, 467 So.2d 358 (Fla.App. 3 Dist.), *rev. denied*, 480 So.2d 1294 (Fla. 1985); *Finst Dev., Inc. v. Bahaor*, 449 So.2d 292 (Fla.App. 3 Dist. 1984); *Nargiz v. Henlopen Developers*, 380 A.2d 1361 (Del. 1977).

The decision of the Alabama Supreme Court being challenged by this Petition is in accord with not only the federal caselaw for the Circuit but also every other appellate decision to discuss this question.

The Petition's contention that jurisdiction in this case is necessary is a most untennable one. There is a complete absence of any substantial federal question. The decision of the Alabama Supreme Court is consistent with the legislative history of the Act as well as supportable by tenets of statutory construction. Further, the Petition is unable to cite a single federal or state decision which is contrary authority to the legal conclusion reached by the Alabama Supreme Court. The present Petition does not raise a substantial federal question.

II. The Alabama state courts correctly denied the application of the 100 lot exemption under the facts of this case.

The basic argument advanced on behalf of Petitioners, while presented under the guise of a "conflict of decisions," is in reality only a dispute over how the factual situations in three separate cases were resolved. An examination of the decision of the Alabama Supreme Court demonstrates that there is the absence of any real conflict that would be subject to review by this Court. The "sheeps clothing" blanketing this issue is readily discernable when the cases cited are examined.

The basic foundation of Petitioners' assertion includes the application of the "common promotional plan" as set forth in Section 1701(4).

> [A] plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name, such land shall be presumed, *without regard to the number of lots covered by each individual offering*, as being offered for sale or lease as part of a common promotion plan."

15 U.S.C. 1701(4) (emphasis added). The Alabama Supreme Court was not the first appellate case to review the application of this provision. In addition to the decision of the Alabama Supreme Court, the "common promotion plan" has been applied in three reported decisions.

The Eleventh Circuit briefly addressed the "common promotion plan" in *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727 (11th Cir. 1982). Judge Vance in authoring the Panel's decision acknowledged the application of Section 1701(4) to the facts of the complaint when he noted:

> [Plaintiffs] contended that Defendants had acted in concert with another developer, Power Corporation, to develop the Dorchester as part of a project which included a second condominium, the Grosvenor.
>
> Plaintiffs submitted a promotional brochure in which Power Corporation referred to itself as the "owner/developer/builder" of both the Dorchester and the Grosvenor and stated that the Grosvenor was continuing the "standard of excellence" that Power Corporation had begun several years ago with the Dorchester. They also submitted a magazine advertisement in which a realtor, Power Realty, Inc., promoted "Power Corporation Luxury Condominiums", including the Dorchester and the Grosvenor. Finally, plaintiffs submitted copies of status sheets from the Florida Department of State show-

> ing that Power Corporation and the Dorchester had the same president and director and the same registered office.

Id. at 729. The Panel confirmed that based upon the allegations of the complaint, a cause of action was stated under the "common promotion plan" and that defendants were not exempted solely because part of the project only involved eighty-six units. The Alabama Supreme Court cited *Eaton* in authoring its affirmance. 525 So.2d 1346, 1349-50.

A similar conclusion based upon the facts of the case was reached in *Grove Towers, Inc. v. Lopez*, 467 So.2d 358 (Fla. App. 3 Dist. 1985). In this case, the court confirmed the application of the "common promotional plan" to a proposed project totalling 108 units in the condominium documents while only 98 units were "intended." *Id.* at 361. Again, *Grove Towers* indicated that individual facts of that case were being reviewed. Nothing contained in the decision of the Alabama Supreme Court decision could even be remotely characterized as "inconsistent" with this opinion. Petition at p. 23.

The guise of Petitioners' assertion is further revealed in an examination of *Dunaway v. Lewis*, 554 P.2d 110 (Okla. Ct.App. 1976) - the other case which Petitioners allege is "inconsistent" with the decision of the Alabama Supreme Court. In *Dunaway*, the Court of Appeals of Oklahoma reviewed a jury verdict in favor of the defendant. At trial, plaintiff had claimed the existence of a "common promotional plan." The jury found in favor of the defendant on this issue. The appellate court aptly noted:

> In the case at bar the defendant produced evidence that Lakeside North Second was not a part of the same promotional plan as Lakeside North. Although his evidence that the developments were not contiguous and were created at different times are not necessarily persuasive, the disparate forms of advertising used by the defendant create a valid question of fact whether Lakeside North Second was or

> was not a part of a common promotional plan with Lakeside North. The fact was properly reserved for the jury.

Id. at 112. *Dunaway*, was another authority relied upon by the Alabama Supreme Court in rendering its opinion. 525 S.2d at 1349-50.

Quite apart from being "inconsistent" with these authorities, the Alabama Supreme Court in reviewing a trial court factual determination, affirmed the lower disposition noting that the relevant statutory provisions were correctly applied. The Court cited at length the factual record that support the determination of a "commonal promotional plan." As noted by Justice Almon:

> The investors' argument below and on appeal is that the developers offered to sell units in Phase I and Phase II as a common plan to development. In support of their argument, the point to the following factors: (1) That Neda, Inc., was formed to promote and sell units in both Phase I and Phase II; (2) The project was advertised, represented, and marketed as a two-phase project consisting of two individual towers adjoining each other, Phase I containing 55 units and Phase II containing 46 units; and (3) The project was advertised and intended by the owners to be a two-phase project containing over 100 units. The investors offered the sworn testimony of Arthur Hill, president of Gulf South Corridor Properties, and Winston Biggs, president of Chancellor Land Company, Inc., in support of their claim during the hearing on March 20, 1986. The testimony of both men was that the development was advertised, represented, and marketed as a two-phase project containing two towers. The towers were to be adjacent to one another sharing a common lobby and beach front. Mr. Biggs testified that the Johnsons were promised the opportunity to trade their Phase I unit for a nicer unit in

> Phase II when it was completed. He also testified, and it was undisputed by the appellants, that none of the purchasers in this suit was presented with a prospectus prior to the execution of their preconstruction purchase agreements.
>
> A prospectus covering the development was, however, prepared by the developers, and it was admitted into evidence at the March 20 hearing. It was denominated "East Pass Towers Condominium Declaration," with the cover depicting twin towers on the Destin coast. Phase I of the development was to be completed by June 1, 1992. The maximum number of units in the development was to be 101 "if, in the sole discretion of the developer, Phase II is built." The prospectus also said, "The developer has reserved the right to construct additional apartment buildings... as part of this condominium at any time prior to June 1, 2002.... The additional units to be constructed will be 46 in number and would be contained in an additional apartment building." Advertising brochures admitted into evidence at the hearing also depicted twin towers joined by a common lobby.
>
> *Id.* at 1348-49.

Without question, the Alabama Supreme Court correctly applied prevailing standards of review under Alabama law to what was in all respects a factual determination. There is dubious merit to Petitioners' assertion that the Alabama Supreme Court decision was "inconsistent" with *Dunaway* or *Grove Towers*. Any alleged conflict giving rise to claim for jurisdiction before this Court is at best illusory. There is no real conflict on the application of law or fact between the underlying facts of this case and how the trial court resolved them or between the authority of the Alabama Supreme Court and any other decision cited by Petitioners. The Court should deny the writ of certiorari.

CONCLUSION

In light of the foregoing, it is clear that:

1. The legislative history of Interstate Land Sales Full Disclosure Act applies to the sale of condominium units.

2. Precepts of statutory construction confirm that the Interstate Land Sales Full Disclosure Act applies to the sale of condominium units.

3. Except for one case which was reversed on appeal, all reported decisions, both federal and state, have held that the Interstate Land Sales Full Disclosure Act applies to the sale of condominium units.

4. There is an absence of any substantial federal question as to whether the Interstate Land Sales Full Disclosure Act applies to the sale of condominium units.

5. There is nothing in a review of the caselaw, applying the common promotional plan to indicate that the decision of the Alabama Supreme Court conflicts with other authorities.

WHEREFORE, Respondents urge this Court to deny the requested Writ of Certiorari.

DONE AND DATED this 19th day of August, 1988.

John R. Benn

425 North Court Street
Florence, Alabama 35630
Attorney for Respondents

APPENDIX

APPENDIX

STATUTORY PROVISIONS

15 U.S.C. 1702(a)

(a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply —

(1) the sale or lease of lots in a subdivision containing less than twenty-five lots;

(2) the sale or lease of any improved land on which there is a residential, commercial, *condominium*, or industrial building, or the sale or lease of land under a contract obligating the seller or lesser to erect such a building thereon within a period of two years.

AGENCY REGULATIONS

24 C.F.R. §1710.1 Definitions

"Lot" means any portion, piece, division, unit, or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land.

24 C.F.R. §1710.5 Statutory Exemptions From Provisions of This Chapter

The requirements of the Act do not apply to—

(a) The sale or lease of lots in a subdivision containing fewer than 25 lots;

(b) The sale or lease of any improved land on which there is a residential, commercial, *condominium*, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years. In the case of *condominium* or multiunit construction, a

presale clause conditioning the sale of a unit on a certain percentage of sales of other units is permissible if it is legally binding on the parties and it is for a period not to exceed 180 days. However, the 180-day provision cannot extend the two-year period for performance. The permissible 180 days is calculated from the date the first purchaser signs a sales contract in the project or, if a phased project, from the date the first purchaser signs the first sales contract in each phase.

REGULATORY ANNOUNCEMENTS

Land Registration, Formal Procedures and Advertising Sales Practices, and Posting of Notices of Suspension, 38 Fed. Reg. 23,866 (1973)

Considerable comment was received with respect to the proposed definition of lot. Essentially, comments complained that OILSR is seeking to regulate everything from securities to country club memberships. Since in this range of coverage *condominiums* were mentioned most frequently, OILSR policy on *condominium* coverage is set forth herein.

The application of the Act to *condominiums* has been consistent OILSR policy since the issue was first raised in 1969. The bases for this position are that *condominiums* carry the indicia of and in fact are real estate, whether or not the units therein have been constructed. A *condominium* is accordingly viewed by OILSR as equivalent to a subdivision, each unit being a lot. Adverse comment, particularly from builders, asserts that *condominiums* are equivalent to houses and the sale of houses was not intended to be covered by the Act. However, the right to *condominium* space is a form of ownership, not a structural description. This *condominium* concept is employed as an ownership form for completely horizontal developments and even for campgrounds. Congress recognized the need to exempt professional builders from the Act and provided an appropriate exemption (15 U.S.C. §1702(3)). For a *condominium* unit sale

to be exempted from the Act, it must accordingly qualify for exemption; i.e., either it must be completed before it is sold, or it must be sold under a contract obligating the seller to erect the unit within two years from the date the purchaser signs the contract of sale. For the purposes of the exemption cited, "buildings comprises the dwelling unit and all utilities or systems necessary to support normal occupancy. Additionally, if a *condominium* dwelling unit is merely incidental to the common facilities (as in the case of recreational developments) all common facilities must be completed within the two-year period to qualify for the exemption since frequently vacation sites are sold without assurances that such facilities will be completed. With respect to *condominiums* intended as primary residences in metropolitan areas, registration typically is unnecessary since most professional builders would qualify for the exemption inasmuch as they are able to deliver a completed unit to a purchaser within two years after the contract of sale has been signed.

Further, the legislative history of the Act has been cited as not authorizing coverage of *condominiums*. However, there is negligible legislative history on the present Act and that legislative history with respect to predecessor bills is unclear on this subject. It is OILSR's position that the amended definition of lot merely codifies OILSR's longstanding position on *condominiums* and is a valid exercise of the Secretary's regulatory authority under the Act to implement the provisions thereof.

Condominium and Other Construction Contracts, 39 Fed. Reg. 7824 (1974)

The Office of Interstate Land Sales Registration (OILSR) offers guidelines in re-emphasising attention to the applicability of the federal land sales registration laws to the offer and sale of *condominiums* and other structures. The Preamble to OILSR regulations published on September 4, 1973 (38 FR 23866 et seq.) points out that *condominiums* are covered by the Act in

that a *condominium* is equivalent to a subdivision, each unit being a lot.

George K. Bernstein, Administrator of the Office, reports that many *condominium* developers and trade associations have inquired concerning coverage of *condominium* developments in light of section 1403(a)(3) of the Interstate Land Sales Full Disclosure Act. (Act). That section exempts from registration sales of existing buildings and sales of land under contracts obligating sellers to erect buildings on the land within two years.

Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 44 Fed. Reg. 24012 (1979)

(c) Improved Lots. — (Section 1403(a)(3) (15 U.S.C. 1702(a)(3) and 24 CFR 1710.10(c)).

This Section exempts: (1) the sale or lease of any improved land on which there is a residential, commercial, *condominium*, or industrial building or (2) the sale or lease of land under a contract obligating the seller to erect such a building on the lot within a period of two years.

For a building or unit to be considered complete, it must be physically habitable and usable for the purpose for which it was purchased. A residential structure, for example, must be ready for occupancy and have all necessary and customary utilities extended to it before it can be considered complete.

If you (the developer or seller) are relying on this exemption and the residential, commercial, *condominium* or industrial building is not complete, the contract must specifically obligate you, the seller, to complete such a building within two years, otherwise the sale is not exempt. The two year period begins on the date the purchaser signs the contract. The use of a contract that obligates the buyer to build within two years would not exempt the sale.